IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 13, 2000

GINGER CHERYL EATHERLY v. DWIGHT ANTHONY EATHERLY

Appeal from the Circuit Court for Davidson County
No. 93D-3132 Muriel Robinson, Judge

No. M2000-00886-COA-R3-CV - Filed May 4, 2001

This post-divorce case involves modification of child support. Following a hearing, the trial court found the father to be voluntarily underemployed and ordered him to pay $200 per week in child support, almost twice the previously ordered amount. Father appeals, contending that the record contains no proof that he is voluntarily underemployed and no proof of his potential income. Because we find the record is insufficient to support the trial court's findings, we vacate the order and remand for additional findings of fact.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and WILLIAM C. KOCH, JR., J., joined.

Randy Wakefield, Carthage, Tennessee, for the appellant, Dwight Anthony Eatherly.

Larry H. Hagar and John Michael Garrett, Nashville, Tennessee, for the appellee, Ginger Cheryl Eatherly.

OPINION

Ginger Cheryl Eatherly ("Mother") and Dwight Anthony Eatherly ("Father") divorced in 1995. The trial court awarded joint custody of the two children, born in 1989 and 1991, to both parties, with Mother designated as the primary custodial parent. Father was ordered to pay child support of $104.50 per week, based upon his annual income of $21,000.

In April 1999, four years after the initial decree setting child support, Mother filed a petition for modification of child support[1] based upon "the needs of the children" and her belief "that [Father] is earning a higher wage than when the parties were divorced in 1995." Father answered, stating, "[Father] would show by attaching proof of his income that his income has gone down since the divorce and not up."

A hearing was held on this matter in March 2000 at which both parties testified.[2] Father testified that he, his father and his brother owned a small business in Smith County, Eatherly Construction Company, where Father worked as a supervisor. Eatherly Construction had only one employee besides Father. Father's father was retired but "helps out;" he handles all the financial and accounting aspects of the business, while Father handles the "outside" work. Father's brother was employed elsewhere, having left the company four years ago. Father testified the business was not profitable, but claimed to have no idea of the value of the company. He testified that the company's largest project the previous year had been a $200,000 water line installation for the City of Hartsville, and that they had already begun a $26,000 project for the city in 2000. Father testified that "about three years ago" the company had switched from a local accountant to one in Kentucky.

Father said he lived with his parents and drove a company truck (the same one he had during the marriage), although he paid for some of the fuel. He testified that he worked about forty hours per week at the construction company and had no source of outside income. His pay stubs showed that he earned $375 per week. He testified he had not received any distribution from the partnership other than his salary. Father had not re-opened his checking account after the "court issued a levy on all the assets in that account in 1996." He said he had no checking account, no savings account, no retirement fund, no personal vehicles, no real estate, no certificates of deposit and no stocks.

Statements of Mother's counsel indicated that counsel had requested during the discovery process "partnership returns" and "bank statements, any evidence of ownership, stock certificates, partnership agreements, any other evidence of any interest" that Father had in the business, but that

---

[1] Mother also filed a petition for contempt based upon Father's purported lack of adherence to the visitation schedule. Father's answer to Mother's petition denied wrongdoing regarding visitation After hearing remarks from counsel, the trial court agreed to make the visitation order more specific in order to decrease misunderstandings as to which parent should have the children at which time. The court declined to hold Father in contempt. Visitation and contempt are not issues on appeal.

[2] Mother's testimony concerned primarily the children's increased expenses and her need for an increase in child support. The test for modification of a child support award is the significant variance test, discussed *infra*. Tenn. Code Ann. § 36-5-101(a)(1); *Turner v. Turner*, 919 S.W.2d 340, 342-43 (Tenn. Ct. App. 1995). Absent extraordinary needs as defined by the child support guidelines, *see* Tenn. Comp. R. & Regs., ch. 1240-2-4-.04, and specific written findings by the trial court, *see id*. at ch. 1240-2-4-.02(7), a child support award is to be based on the net income of the obligor parent. Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(2).

those documents had not been produced. Father's counsel took exception to that statement, asserting that, had those documents been requested, they would have been produced.[3]

Upon the conclusion of the testimony, the trial court stated:

> Let me deal with this case today, and next time they come back then we're going to add some defendants here.
>
> I make this finding that Mr. Eatherly comes before this Court again under-employed,[4] . . . he's an evasive witness, he will not answer the questions out right. If I were to glean anything from his testimony, he has convinced me that he has the wherewithal to pay an adequate amount of child support, that he set upon a course and is bound and determined not to give the Court accurate information, and not to pay the correct amount of child support. So this Court has to do the best it can.
>
> He hides his assets, he's not straightforward with this Court. He's a skilled construction company owner, he's been in that business for many years. He's worked as a foreman at other companies, he's a backhoe operator, and this Court has done business with backhoe operators. I certainly know what the going rate per hour for someone who is engaged and has that kind of skill is. He almost insults the intelligence of this Court.
>
> He lives with his father. He virtually has no expenses, he's a partner in a business, now his father is retired so he totally runs the business. He's not a credible witness. He has the ability, minimum ability to make between $45,000 to $50,000 a year. So this Court, making those findings will assess the child support at $860 per month. That's $200 a week. . . .
>
> Now, you all have a record. There are other courts to go to, if its remanded back to me and then obviously I'm going to have to take steps to incorporate all of these other persons in this case that have financial records on Mr. Eatherly, including the City of Carthage, and any other place that he does business with.

The court entered an order finding Father "is willfully and voluntarily under-employed and, that [Father] has been evasive concerning his true income, and based on his education and work experience the court finds that this true earning potential or capacity is Forty-five Thousand ($45,000) Dollars per year . . . that any further proceedings in this matter as to child support shall

---

[3] Because no request for production of documents is included the record, we cannot determine what had been requested.

[4] In opening statement, Mother's counsel reminded the court that Father had earlier been found underemployed, and the court also indicated its prior experience with Father reflected a reluctance to fully disclose. However, the record before us does not include any part of prior proceedings.

include Eatherly Brothers Construction Company as a party to the proceedings and any determination that [Father] has hidden income or assets shall be used to determine an award of back child support for the support of the parties' two (2) minor children." Father appeals the trial court's order, contending the trial court erred by "making a determination that he was underemployed because he wasn't asking for a reduction in his child support." Father also argues that the trial court's findings, that he was underemployed and that he had a potential income of $45,000 to $50,000 per year, were not supported by the evidence.

I.

Relevant statutes and regulations governing child support are intended "to assure that children receive support reasonably consistent with their parent or parents' financial resources." *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248-49 (Tenn. Ct. App. 2000). The courts are required to apply the amounts set by application of the child support guidelines as a rebuttable presumption of the correct amount of support. Tenn. Code Ann. § 36-5-101(e)(1).

One of the stated goals in the development of the guidelines was "[t]o ensure that when parents live separately, the economic impact on the child(ren) is minimized and to the extent that either parent enjoys a higher standard of living, the child(ren) share(s) in that higher standard." Tenn. Comp. R. & Regs., ch.1240-2-4-.02(2)(e). Thus, courts are to set the amount of prospective child support so that children will receive support reasonably consistent with their parents' resources and ability to provide support. These goals are best fulfilled by use of current, accurate information regarding the obligor parent's income, because under the guidelines the amount of support is formulaic, unless special circumstances are found, and is based on "a flat percentage of the obligor's net income." Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(2).

The applicable standard for determining whether an existing child support order should be modified, as requested by Mother in this case, is the "significant variance test" adopted by the General Assembly 1994. *Turner v. Turner*, 919 S.W.2d 340, 342-43 (Tenn. Ct. App. 1995). This legislation provides that:

> In cases involving child support, upon application of either party, the court shall decree an increase or decrease of such allowance when there is found to be a significant variance, as defined in the child support guidelines . . . between the guidelines and the amount of support currently ordered unless the variance has resulted from a previously court-ordered deviation from the guidelines and the circumstances which caused the deviation have not changed.

Tenn. Code Ann. § 36-5-101(a)(1).

A significant variance between the guideline amount and the current support order is defined as "at least 15% if the current support is one hundred dollars ($100.00) or greater per month," and "[s]uch variance would justify the modification of a child support order unless, in situations where

a downward modification is sought, the obligor is willfully and voluntarily unemployed or underemployed." Tenn. Comp. R. & Regs., ch. 1240-2-4-.02(3). The party seeking the modification bears the burden of showing the necessary significant variance. *Turner*, 919 S.W.2d at 345; *Seal v. Seal*, 802 S.W.2d 617, 620 (Tenn. Ct. App. 1990).

The significant variance test obviously requires that the court first determine the obligor's income to which the guidelines' formula will be applied.

> Determining the amount of the non-custodial parent's income is the most important element of proof in a proceeding to set child support. This is the case when setting initial support and when considering requests for modification of an existing support obligation. The non-custodial parent's income is, in fact, doubly important in a modification proceeding because the child support guidelines require the courts to examine the basis for the current support order and the non-custodial parent's current income.

Turner, 919 S.W.2d at 344 (citations omitted).

The guidelines specifically recognize that the court needs reliable information regarding the "current ability to support" when establishing or modifying a support order. Tenn. Comp. R. and Regs., ch. 1240-2-4-.03(3) (e) and (f). Otherwise, there could be no reasonable assurance that the children are receiving support commensurate with the parent's ability to provide support.

The evidence and rulings in the case before us implicate two separate but related approaches to determining as accurately as possible the obligor parent's actual income or ability to provide support. The first approach is used where the obligor parent's income may have been accurately reported, but the court is authorized to set the child support obligation on a higher potential income because the obligor has chosen to pursue an occupation or business venture which produces substantially less income than the parent is capable of earning. The guidelines address this situation, stating, "If an obligor is willfully and voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience." Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(3)(d).

The second approach is used where an obligor's reported income does not truly reflect that parent's ability to provide support, and the court may impute additional income. In particular, a self-employment situation may offer an opportunity for an obligor to limit his or her salary or other income even though the business could provide more income. For example, in *Koch v. Koch*, 874 S.W.2d 571 (Tenn. Ct. App. 1993), a father asserted he had no income from his business but had made only capital withdrawals. This court discounted those assertions, examined the business's accounts, and found that the gross income of $165,000 per year should provide a nice income to the proprietor. *Koch*, 874 S.W.2d at 578.

We have acknowledged the difficulty in establishing income of a self-employed business owner, *Koch*, 874 S.W.2d at 578, and the potential for manipulation of income in that situation. *Sandusky v. Sandusky*, No. 01A01-9808-CH-00416, 1999 WL 734531 at *4-5 (Tenn. Ct. App. Sept. 22, 1999) (no Tenn. R. App. P. 11 application filed) (solely owned company's accumulation of retained earnings can be considered when setting child support); *Beem v. Beem*, No. 02A01-9511-CV-00252, 1996 WL 636491 at *4 (Tenn. Ct. App. Nov. 5, 1996) (no Tenn. R. App. P. 11 application filed) (recognizing the potential for self-employed obligor spouse to manipulate income, but finding that the evidence did not support imputing income); *Renick v. Renick*, No. 01A01-9007-CV-00263, 1991 WL 99514 at *6 (Tenn. Ct. App. June 12, 1991) (perm. app. denied Nov. 4, 1991) (husband's potential income "derived from various business dealings through his corporations and real estate" is to be addressed on remand).

In *Sandusky v. Sandusky* this court stated:

> A self-employment situation where an obligor spouse or parent can control the salary he or she receives may raise issues requiring the court to examine whether the potential exists for the obligor to manipulate his reported income either by failing to aggressively solicit business or by inflating his expenses, thereby minimizing his income. Another way to manipulate reported income is to pay a lower salary and not pay dividends, allowing the corporation to accumulate as retained earnings profits which would otherwise be distributed as dividends to the sole shareholder.
>
> Where a business is solely owned, the company's accumulation of retained earnings can be considered in determining the income available to the sole shareholder who has set his or her own salary. . . . An obligor parent cannot avoid a support obligation by simply arranging a smaller salary while a solely-owned business prospers.

Sandusky, 1999 WL 734531 at *4-5 (citations omitted).

The two approaches, establishing potential income in a willful underemployment situation and imputing income where actual ability to receive income from business activities is underreported, while dependent on different factual underpinnings, are both methods to arrive at the most accurate determination of the obligor parent's income and ability to support. Where a self-employed individual's reported income is low, either approach, or sometimes both, may be appropriate for consideration depending upon the allegations of the cause of the low income.[5]

In the case before us, the trial court specifically found that Father was willfully and voluntarily underemployed, but also found that Father had been evasive concerning his true income.

---

[5] This court has sometimes found the theories intertwined, or found them both to be implicated by the circumstances. *See, e.g., Allen v. Allen*, No. M1999-00748-COA-R3-CV, 2000 WL 1483389 (Tenn. Ct. App. Oct. 10, 2000) (no Tenn. R. App. P. 11 application filed); *Emison v. Emison*, No. W1998-00591-COA-R3-CV, 1999 WL 1336054 (Tenn. Ct. App. Dec. 27, 1999) (no Tenn. R. App. P. 11 application filed).

Thus, the trial court obviously had concerns about the lack of evidence of the financial condition of Father's business. While a parent's income is generally established with proof such as pay stubs, personal tax returns, or other documents, *Kirchner v. Pritchett*, No. 01A01-9503-JV-00092, 1995 WL 714279 at *2 (Tenn. Ct. App. Dec. 6, 1995) (no Tenn. R. App. P. 11 application filed), other information is sometimes needed to determine the parent's actual ability to provide support. Especially where issues of potential income or imputed income are involved, other proof is necessary to reach the factual conclusions required to support those findings.

II.

Where issues are raised about actual income from self-employment, information beyond pay stubs or individual tax returns may be needed. The guidelines require the court to consider all income of the obligor parent, and define gross income as including:

> all income from any source (before taxes and other deductions), whether earned or unearned, and includes . . . income from self-employment. Income from self-employment includes income from business operations and rental properties, etc., less reasonable expenses necessary to produce such income. Depreciation, home offices, excessive promotional [sic], excessive travel, excessive car expenses, or excessive personal expenses, etc., should not be considered reasonable expenses.

Tenn. Comp. R. & Regs., ch. 1240-2-4-.03 (3)(a). Thus, a determination of the income from self-employment may be arrived at by scrutiny of various aspects of the parent's business.

Several principles have evolved regarding evidence of a parent's income. We have previously held that because the child support guidelines embody a rebuttable presumption that the custodial parent is entitled to receive financial support from the non-custodial parent, once the custodial parent proves custody of the child or children, the burden of going forward with proof relating to income may shift to the non-custodial parent. *Kirchner*, 1995 WL 714279 at *3. We explained:

> The risk of failure or inability to produce evidence of the non-custodial parent's income and expenses should not fall on the custodial parent. This information is within the non-custodial parent's control. Thus, if the non-custodial parent has failed or refused to produce evidence of his or her income prior to the hearing, the burden of producing satisfactory evidence of income and expenses should be placed on the non-custodial parent - the party most able to provide it.

Id.

In *Kirchner*, despite discovery attempts by the mother, the evidence at trial regarding the father's past income and expenses was sketchy at best. *Id.* at *2. In the case before us, Father

apparently produced his individual tax returns and some pay stubs from his employment at his family's business. While such information might be sufficient if the salary were his only source of income, his ownership interest in the business makes information about the finances and assets of that business relevant also. Although Father testified about his sources of income, his testimony about the financial condition of the business was vague and sketchy.

The guidelines include provisions designed to address the situation where the obligor parent fails to provide sufficient information for the court to ensure that the children receive support reasonably commensurate with the parent's ability to pay. For example, when the court is establishing an initial order and the non-custodial parent does not provide evidence of income, the court is directed to impute an annual income of $25,761, the average annual income for Tennessee families as provided by the 1990 census. Tenn. Comp. R. & Regs.,ch. 1240-2-4-.03(3)(e). The guidelines further provide:

> When cases with established orders are reviewed for adjustment and the obligor fails to produce evidence of income (such as tax returns for prior years, check stubs, or other information for determining current ability to support), and the court has no other reliable evidence of the obligor's income or income potential, the court should enter an order to increase the child support obligation by an increment not to exceed ten percent (10%) per year for each year since the support order was entered or last modified.

Tenn. Comp. R. &. Regs., ch. 1240-2-4-.03(3)(f).

The record herein is inconclusive as to whether Mother, who had the burden of establishing the grounds for the modification she sought, made an appropriate discovery request for the business records needed to establish "other information for determining current ability to support." The trial court made no finding on that issue and did not invoke the provision quoted above as a basis for setting the amount of support. Mother's initial allegation in the petition that Father was "earning a higher wage than when the parties divorced" was not sufficient on its own to put Father on notice that information other than his tax returns and pay stubs would be needed.

Father provided his individual tax returns for 1995 through 1998 to Mother's counsel during discovery, but they were not made part of the record. Father's attorney stated that "his income is running between $17,000 and $18,000 each year and he has not had an increase nor does he have any hidden income." Father's testimony indicated that his income for 1999 had been "approximately $17,000." However, Father is a part-owner of a construction company which did hundreds of thousands of dollars in business the previous year. Father, as a partner and the only family member who works full-time for the company, may have some control as to his compensation. He lives with his parents and seemingly has no obligations other than his child support and occasional fuel for the company truck. He claims, however, that he has no bank accounts, no investments, no retirement account, no property, and no assets. These facts led the trial court to question Father's actual income and to make findings that Father was an evasive witness who was determined not to give the court

accurate information, and specifically, "He hides his assets, he's not straightforward with this Court."

Accordingly, the trial court ordered that any further proceedings on child support would include Eatherly Construction as a party and also stated that the company records would be required, as well as records of parties doing business with the company. For the reasons stated above, we agree with the trial court that information from Eatherly Construction may be necessary in order to determine Father's actual ability to provide support. Because no such information was presented, we are unable, as apparently was the trial court, to impute additional income to Father from his interest in the company or other assets.

III.

Although the trial court expressed some doubt about Father's real income, including a finding that he "has been evasive concerning his true income," the court based its modification of child support on a finding that Father was underemployed. Before examining the legal principles applicable to underemployment findings, we first address Father's argument that the trial court "erred in allowing an increase in support by making a determination that he was underemployed because he wasn't asking for a reduction in his child support." For this argument, Father relies upon Tenn. Comp. R. & Regs., ch. 1240-2-4-.02(3), which states, in pertinent part:

> For the purposes of defining a significant variance between the guideline amount and the current support order . . . a significant variance shall be at least 15% if the current support is one hundred dollars ($100.00) or greater per month and at least fifteen dollars ($15.00) if the current support is less than $100.00 per month. Such variance would justify the modification of a child support order unless, in situations where a downward modification is sought, the obligor is willfully and voluntarily unemployed or underemployed. . . .

Father contends that, because he did not seek a downward modification, the trial court improperly considered whether he was underemployed. We cannot agree. That provision simply prevents a court from ordering a "downward modification" where an obligor parent is "willfully and voluntarily unemployed or underemployed." The trial court may properly consider a parent's willful and voluntary underemployment to increase, or decline to decrease, the child support obligation. Tenn. Comp. R. & Regs., ch. 1240-2-4-.03(d) ("If an obligor is willfully and voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income, as evidenced by educational level and/or previous work experience."); *Ralston v. Ralston*, No. 01A01-9804-CV-00222, 1999 WL 562719 at *3 (Tenn. Ct. App. August 3, 1999) (no Tenn. R. App. P. 11 application filed) ("The issue of willful and voluntary underemployment . . . can arise where the obligee parent seeks an upward modification [of child support payments], as well as where the obligor spouse seeks a reduction.").

We turn now to Father's other arguments, that the trial court erred in its findings that he was willfully and voluntarily underemployed, and that his potential income is $45,000 per year. Where underemployment is an issue, certain types of evidence beyond the obligor's actual current income become relevant. "The determination of whether a particular parent is willfully and voluntarily unemployed or underemployed is fact-dependent, and can only be made after consideration of all the circumstances surrounding that parent's past and present employment or business activities." *Ralston*, 1999 WL 562719 at *3. In these cases, the courts should examine the reasonableness of the obligor parent's career decisions in light of all the relevant facts, including the potential impact on the children.

Many underemployment decisions deal with a lowering of income due to a career or job change. *See, e.g., Brooks v. Brooks*, 992 S.W.2d 403, 407 (Tenn. 1999) (obligor who sold successful business and began cattle breeding operation was underemployed); *see also Ralston*, 1999 WL 562719 at *4-5 (discussing cases involving loss of previous employment, where voluntariness of change and efforts to replace income are important factors). It is clear that parents will not be permitted to avoid or lower their support obligations by liquidating their businesses, quitting work, or taking a lower paying job without good reason. *Wix v. Wix*, No. M2000-00230-COA-R3-CV, 2001 WL 219700 at *13 (Tenn. Ct. App. March 7, 2001).

In this case, Father has not changed or left his employment. He is working at the same place presumably doing much the same work as he was when support was initially set. Although he has not sought a reduction in the amount of support, he testified his income had decreased. A review of cases involving lowered income or continuation of low income in the same employment suggests that, again, the reasonableness of the obligor parent's choice to remain in the same occupation, in light of the obligation to support children, is a critical factor in determining whether the parent is willfully and voluntarily underemployed A parent who continues in his or her pre-divorce income-producing activity may be found underemployed where remaining in that activity is unreasonable. *Garfinkel v. Garfinkel*, 945 S.W.2d 744, 747-48 (Tenn. Ct. App. 1996) (trial court properly considered master's degreed husband's educational background and prior earnings when setting child support, even though husband quit his job before the marriage and lived off income from his rental properties).[6]

In *Hyden v. Hyden*, No. 02A01-9611-CH-00273, 1997 WL 593800 (Tenn. Ct. App. Sept. 25, 1997) (no Tenn. R. App. P. 11 application filed), a mother sought an upward modification of the child support obligation on the basis that the children's father was willfully and voluntarily underemployed. At the time of their divorce, the father was a college student, as he had been during part of their marriage, having left the trucking business to become a minister. After his graduation,

[6] We have at least once indicated that an obligor parent's decision to remain in an unsuccessful career or business venture may not be reasonable. *Ford v. Ford*, No. 01A01-9611-CV-00536, 1998 WL 730201 at * 3 (Tenn. Ct. App. Oct. 21, 1998) (no Tenn. R. App. P. 11 application filed) ("Any reasonable person who recognizes that he or she has little future in the entertainment business would realistically pursue something else."). However, that observation, while offered as explanation for the trial court's characterization of the parent as underemployed, was not the basis for a determination of willful and voluntary underemployment under the guidelines. *Id.*

he enrolled in seminary as a full-time student. Although he had attempted to obtain work as a student pastor, he had not obtained a permanent position. He worked at two part-time summer jobs, but intended to remain a full time student. The trial court set the father's support amount based on the average of his hourly pay at his summer jobs multiplied by forty hours per week. On appeal, this court found that the trial court had made an implicit finding that the father was willfully underemployed and affirmed the trial court's determination of the father's potential income as commensurate with his prior work experience. *Hyden*, 1997 WL 593800 at *3. Thus, this court affirmed the trial court's determination that the father should be required to provide support commensurate with at least full time work, even if not in work requiring a college degree.[7]

In *Mitts v. Mitts*, 39 S.W.3d 142 (Tenn. Ct. App. 2000), we considered a wife's argument that the husband's initial child support obligation should be set on his potential earnings and that the trial court erred in refusing to find that the husband was willfully and voluntarily underemployed. In that case, the husband's long-term employment with a corporation owned by his father, himself and his siblings, ended when the corporation sold its facilities. *Mitts*, 39 S.W.2d at 145. The husband, however, continued to be paid by the corporation at his former salary level. He attempted to enter a new field, which had not been very successful yet, partly because of the husband's health problems. *Id*. at 148. This court found, given all the facts in the case, that the evidence did not preponderate against the trial court's finding that the husband was not underemployed. *Id*. We think it was significant to the court that the husband continued to receive income from his former employer that was equal to his former salary.

In another recent case, this court affirmed a trial court's refusal to find the obligor parent willfully underemployed in a proceeding for increase in the support amount. *Scott v. Scott,* No. M1999-00322-COA-R3-CV, 2001 WL 266038 at *4 (Tenn. Ct. App. March 20, 2001). In that case, the obligor parent was self-employed in the home repair business and as a flight instructor. A medical condition, known to the mother at the time of divorce, prevented his pursuing his home repair business full time, and he had some difficulty finding steady work as a flight instructor. This court held that the evidence did not preponderate against the trial court's conclusion, specifically noting that the mother was aware of his disability when the parties entered into their marital dissolution agreement and that the father had demonstrated good faith by earlier voluntarily increasing his support payments when his income had increased. *Id.*; *see also Anderton v. Amari*, No. M1999-011450COA-R3-CV, 2000 WL 827947 (Tenn. Ct. App. June 27, 2000) (no Tenn. R. App. P. 11 application filed) (affirming trial court's finding that mother, who alleged that the self-employed father was underemployed because he worked fewer than twenty-five hours per week, did not meet her burden of proof).

[7] We think it was significant to this court's rejection of the mother's argument that the father's earning potential should be set on the basis of his college degree that the father had decided to become a minister while still married and with the mother's support. He had pursued that goal ever since, but could not be employed as an ordained minister until he finished seminary, and he had tried to find student pastor jobs.

In *Herrera v. Herrera*, 944 S.W.2d 379 (Tenn. Ct. App. 1996), it was undisputed that the father's income from his medical practice had significantly decreased. The trial court determined that the father was underemployed and attributed the lower income to the father's preoccupation with his divorce litigation, and held, "once this litigation is over that he will be free to now be far more gainfully employed." *Herrera*, 944 S.W.2d at 387. On appeal, this Court noted that evidence at trial indicated that the drop in the father's income was largely due to a decrease in referrals and in Medicare reimbursements. Nevertheless, this court did not reverse the finding of underemployment, but instead found that, even if the father were underemployed, the trial court was required to make an express determination of the obligor's potential earnings before it could set the amount of child support and remanded for such purpose. *Id*.

In *State ex rel. Davenport v. Partridge*, No. E1999-02779-COA-R3-CV, 2000 WL 1877492 (Tenn. Ct. App. Dec. 27, 2000) (no Tenn. R. App. P. 11 application filed), this court vacated a trial court's upward modification of a father's child support obligation where one of the claims was that the father could make more money if, instead of working for his father in the family's hotel and restaurant, he were employed in a job utilizing his education (an Associate's Degree).[8] After finding "no evidence, other than speculation by the State, as to what [the father's] earning potential would be were he employed within his field of study," "no evidence as to exactly what particular job, or jobs, [the father's] Associates Degree qualifies him for" and no "evidence presented regarding the marketability of [the father's] Associates Degree," this court stated, "We believe that a determination of underemployment in this case required findings of fact with respect to the marketability of Mr. Partridge's degree and his earning potential and, for reasons hitherto stated, we find the record to be deficient in such findings." *Partridge*, 2000 WL 1877492 at *3.

From this review of our holdings, two general rules are confirmed. First, the reasonableness of the obligor parent's choice to remain in a lower paying situation should be examined, including the situation at the time of the initial setting of the award, other options for employment that are available, and the parent's obligation to provide support. The parent's "first obligation is to provide support" to his or her children. *Watters v. Watters*, 22 S.W.3d 817, 823 (Tenn. Ct. App. 1999) (father who quit his job rather than move to another city in order to remain near his son was voluntarily underemployed).[9] The second rule is that the burden of proof to establish willful and

---

[8] This court also found there was not sufficient evidence in the record to support the conclusion that the benefits of food, lodging, and vehicle use provided to the father by his parents constituted in kind remuneration imputable to him under the guidelines because there was no evidence those benefits were payment for services rendered. *Partridge*, 2000 WL 1877492 at *2.

[9] Our courts have long enforced support obligations. "It seems abundantly clear that since time immemorial it has been the public policy of this state that a parent is under a duty to support his [or her] children." *Witt v. Witt*, 929 S.W.2d 360, 362 (Tenn. Ct. App. 1996). Our child support laws are designed to prevent non-custodial parents from shirking responsibility for the children they willingly conceived. *See Nash v. Mulle*, 846 S.W.2d 803, 808 (Tenn. 1993). We agree that "the judicial system should look with the gravest disfavor upon parents who through their fault or design become underemployed in an effort to evade their legal, natural obligation to support their children." *Anderson v. Anderson*, No. 01A01-9603-CV-00118, 1996 WL 465242 at *1 (Tenn. Ct. App. Aug. 16, 1996) (no Tenn. R. App. P. (continued...)

voluntary underemployment lies with the custodial parent. As with any other finding, a finding of underemployment must be supported by evidence in the record. *Ralston*, 1999 WL 562719 at *9.

If the evidence demonstrates that the obligor parent seeking the modification is willfully and voluntarily unemployed or underemployed, then the court is required to use that parent's potential income, rather than actual income, in setting the child support obligation. It is well settled that a court finding an obligor parent willfully and voluntarily underemployed must make a finding as to the parent's potential earnings, taking into consideration the obligor's educational level and/or previous work experience. *Garfinkel*, 945 S.W.2d at 748; *Herrera*, 944 S.W.2d at 387; *Ford v. Ford*, No. 02A01-9507-CH-00153, 1996 WL 560258 at *4 (Tenn. Ct. App. Oct. 3, 1996) (no Tenn. R. App. P. 11 application filed) (remanded to the trial court for a determination of the husband's potential income, specifically directing the court to consider his previous work experience and his educational background because the trial court had made no finding regarding his potential income since it had not found the husband to be willfully underemployed). A finding of potential income must have an evidentiary basis.[10] *Allen v. Allen*, No. M1999-00748-COA-R3-CV, 2000 WL 1483389 at *6 (Tenn. Ct. App. Oct. 10, 2000) (no Tenn. R. App. P. 11 application filed). An obligor's potential income is a question of fact which this court is unable to review absent sufficient evidence in the record. *Ralston*, 1999 WL at *9 (citing *Renick*, 1991 WL 99514 at *6).

No evidence was presented that Father was capable of earning a greater income, or of what that income might be. The trial court's finding that he was capable of earning a far greater income was based upon his experience in construction and as a backhoe operator, but there was no evidence regarding his employability or potential earnings. Thus, the record prevents us from conducting an independent review to ascertain the propriety of the trial court's decisions that Father is underemployed or the amount of his potential earnings. Accordingly, this case must be remanded for further fact finding. *Herrera*, 944 S.W.2d at 394; *Ralston*, 1999 WL 562719 at *9*;Partridge*, 2000 WL 1877492 at *4. Therefore, we vacate the trial court's findings that Father was underemployed and that he was capable of earning $45,000 per year and, consequently, vacate the resulting modification of support. On remand, the trial court or Mother may pursue Father's self-employment income and assets in order to determine his actual ability to support and/or evidence regarding Father's underemployment and potential income.

---

[9](...continued)
application filed).

[10]Our courts have in some cases determined that the previous income of the obligor is an accurate measure of potential income. This approach is most applicable when an obligor parent has voluntarily discontinued his prior employment or other income-producing activity, because, without the conscious decision to cease the activity, the actual income would have continued. *See Brooks*, 992 S.W.2d at 407; *Watters*, 22 S.W.3d at 823. Because Father's income in the case before us has decreased, but not through a change in occupation, and his child support was already set on the greater income, this method is not applicable herein.

IV.

The trial court's order modifying Father's support obligation is vacated. The case is remanded for further proceedings necessary to determine Father's ability to provide support and to set an amount of support, if modification is warranted. Until such proceedings occur and an order is entered, Father shall pay child support as set before the modification appealed herein, $104.50 per week. Because the additional amount paid by Father since the trial court's order is presumed to have benefitted the children, Father may not seek refund of those amounts. The costs of this appeal are taxed equally to both parties, for which execution may issue if necessary.

_____

PATRICIA J. COTTRELL, JUDGE